United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

75-1149

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P/S

UNITED STATES COURT OF APPEALS

For the

SECOND CIRCUIT

Docket No. 75-1149

UNITED STATES OF AMERICA

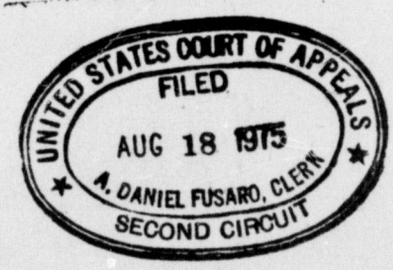
Appellee,

-against-

VINCENT PACELLI, JR.

Appellant.

APPELLANT'S PETITION FOR REHEARING



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE

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No. 75-1149

UNITED STATES OF AMERICA

Appellee

vs.

VINCENT PACELLI, JR.

Appellant

PETITION FOR REHEARING

On July 24, 1975 a panel of this Court (Mulligan, Clark, J., and Mansfield) affirmed appellant's conviction and life sentence. Gross departures from prior decisions, including those of the United States Supreme Court, misapprehension of the facts, and the importance of the issues involved, clearly warrant a rehearing on the issues discussed below.

1. Prohibited cross-examination

The court upheld, as within the trial judge's discretion, the complete prohibition of any inquiry by the defense into three vital areas: Lipsky's suggestion, a month before the murder of Parks, that two witnesses be "burned," Lipsky's previous perjurious implication of Pacelli in a narcotics offense, and a promise of immunity by the Government, which Lipsky had denied under oath in two previous trials. Preclusion of these inquiries was upheld on the dual ground that the scope of cross-examination is "within the discretion of the trial judge" (Sl. op. #1153, p. 5090) and there was already before the jury "ample evidence...that Lipsky was a vicious criminal with every motive to implicate Pacelli" (p. 5091). It is respectfully submitted, however, that, in the context of this case, the first proposition is erroneous and the second virtually irrelevant.

Cross-examination is a matter of profound constitutional right, not a matter of judicial discretion, except as to matters of form, detail, or repetition. (Br. pp 31, 36; District of Columbia v. Clawans, 300 U.S. 617, 632 (1937); Chambers v. Mississippi, 410 U.S. 284, 298 (1973). None of the matters complained about fell within the discretionary area. Each was a discrete inquiry, having direct relevance to Lipsky's credibility. They did not merely tend to establish Lipsky's viciousness or licentiousness, as the court apparently believed.

Lipsky's suggestion that two witnesses be "burned," tended strongly to show Lipsky's general plan and scheme for dealing with witnesses and thus tended to prove the defense's claim that, contrary to Lipsky's testimony, the plan to dispose of Parks originated with Lipsky, not Pacelli, and that Lipsky, not Pacelli, had carried out that plan. The second, Lipsky's prior sworn testimony that Pacelli was present and participating in a drug transaction at Yellowfingers, which testimony was false, tended to prove that Lipsky had framed Pacelli on a prior but closely related occasion. To equate this with general evidence of dishonesty-as to which there was admittedly abundant proof, and thus regard it as cumulative-is to ignore reality. The fact that the available extrinsic proof of the frame was less than conclusive is hardly determinative. The defense was entitled to inquire in the hope that Lipsky might admit the frame or, in the demeanor of his denial persuade the jury of its falsity. The third area of inquiry completely precluded was the fact that the Government promised Lipsky immunity and he denied it under oath. The court upholds the exclusion on the ground that "Lipsky admitted that although he knew he had complete immunity, he lied in answering that he had no immunity" (p. 5094). There is no such admission in the record. The defense was not permitted to ask Lipsky if he had immunity, or if he heard the Government promise him immunity prior to his denials of any Governmental promises. Thus, Lipsky was permitted to pass off his sworn testimony in two prior trials as literally true, i.e. there was no evidence before the jury that his prior testimony was false (See

Appellant's Brief, p. 27; Reply Brief, p. 5).

2. Denial of psychiatric examination and exclusion of psychiatric testimony.

In upholding the trial judge's refusal to permit a psychiatric examination of Lipsky and his exclusion of the testimony of the defense psychiatrist, this court expanded trial judge discretion to a point where judicial review appears a fiction. And where, as here, the alleged discretion results in depriving the jury of the essence of the defense's case, trial is not by jury but by district judge. That may be an efficient system; it may even be a good system; but it is not the system our Constitution contemplates.

None of the cases cited by the Court (p. 5096) comes close to sanctioning the decision below. If appellant made no showing of the witness's mental illness such as to compel a psychiatric examination, no such showing can be made by a defendant. And if the qualifications of the defense psychiatrist, the foundations for his testimony, and the conclusions reached are not so cogent as to be admissible as of right, juries will always be denied the assistance of psychiatric testimony relating to credibility where the trial judge, for any reason or for no reason, prefers to exclude it.

Where, as below, there is strong evidence of mental illness in the witness, his testimony is virtually the entire prosecution case, and the charge is a serious one, a psychiatric examination is clearly required by the cases(App. Br. p. 43). To hold otherwise is virtually to deny there is a possible relationship between mental illness and

credibility, and thus to retreat to the dark days of lay ignorance and arrogance in psychological matters.

In holding that the defense was not entitled to present its psychiatric evidence to the jury, the court not only cited cases which do not support the trial court (p. 5096) and overlooked dozens which uphold appellant's position (See App. Reply Br. p. 15) it misapprehended the facts and, therefore, the issue.

Contrary to the court's impression, Dr. Abrahamsen did not merely testify that Lipsky was "psychopathic and incapable of telling the truth" (p. 5096). Dr. Abrahamsen testified that Lipsky was a "pathological liar" (A. 791) who had a distorted perception of his own self-interest (A. 761) and an inability to distinguish reality (A. 1152, 751) (a manifestation of psychosis (A. 757)). In addition, Lipsky was violent, vindictive (A. 825); unable to accept responsibility or blame for his conduct (A. 762), and a drug addict (A. 763, 788).

In excluding this evidence, the court deprived the jury not only of Dr. Abrahamsen's medical conclusions, but of Lipsky's diagnostic life pattern (A. 823)* and the relationship of Lipsky's mental illness to his credibility. What this court believed was merely "eccentric behavior" on Lipsky's part (p. 5097) was evidence

*Contrary to the court's implication (p. 5097), moreover, the jury was not in possession of all the information Dr. Abrahamsen relied upon. He relied, as he properly should (Federal Rules of Evidence §703) on much medical and biographical data which was not before the Jury. App. Brief pp 47-8.

of a severe mental illness to Dr. Abrahamsen. To deny the jury access to Dr. Abrahamsen's opinion is to deny a jury trial.

The defense was not merely that Lipsky was a criminal of the lowest sort but that he was crazy, and that his craziness enabled him, with apparent sincerity and lucidity, to blame another for a crime he himself committed. The jury very probably-and very reasonably-looked askance at such a defense since appellant appeared to them to offer no expert to support it. To forbid the defense from offering its expert-in an era where every layman knows that mental illness is the subject of expertise-is quite simply to destroy the defense. Such is not and cannot be the law. Washington v. Texas, 388 U.S. 14, 19 (1967).

CONCLUSION

For the foregoing reasons, it is respectfully suggested that a rehearing should be granted, and that it be en banc.

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U.S.
v.
Pacelli

Dkt. #75-1149

Certificate of Service

Two copies of Appellant's Petition For Rehearing were mailed to U.S. Attorney Paul Curran, Federal Courthouse, Foley Square, N.Y., N.Y., First class, on August 12, 1975.

Steven Duke

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